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CHARLES ELMORE C

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

[redacted] No. 10

No. [redacted], Original.

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED ANSWER AND TO WITHDRAW ANSWER PREVIOUSLY FILED.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

Minnich Press, 77-79 Beekman Street, New York City

In the

Supreme Court of the United States

October Term—1929.

State of New Jersey, Plaintiff, against The City of New York, Defendant.	No. 18, Original.

NOTICE.

To:

Hon. William A. Stevens,
Attorney General of the State of New Jersey;

Hon. Duane E. Minard,
Assistant Attorney General of the State of New Jersey,
Solicitors for the Plaintiff.

Sirs:

Please Be Advised that on Monday, February 2d, 1931, the defendant, The City of New York, will apply to the above named Court for leave to file its Amended Answer herein, a copy of which is annexed hereto, and for the relief prayed for in the annexed motion.

Dated, January 27, 1931.

Arthur J. W. Hilly,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1929.

STATE OF NEW JERSEY, Plaintiff, against THE CITY OF NEW YORK, Defendant.	No. 18, Original.

IN EQUITY.

MOTION FOR LEAVE TO FILE AMENDED ANSW AND TO WITHDRAW ANSWER PREVIOU FILED WITHOUT PREJUDICE TO PROCEEDI ALREADY HAD.

Comes now the defendant, The City of New York, b Corporation Counsel and Solicitor, and shows as follow wit:

1. That pursuant to leave of this Court granted in 1929, the State of New Jersey filed in this Court a B Complaint against the defendant, The City of New Y praying that this Court issue its writ of injunction petually restraining the defendant, its contractors, of and agents and employees from dumping or suffering dumped any garbage, refuse or other noxious, offensiv injurious matter into the Atlantic Ocean or other w of the United States off the coast of New Jersey and otherwise defiling or polluting said waters and the be of said state.

2. That the suit in equity of the State of New Jers permitted by this Court to be commenced was docket

No. 21, Original, October Term, 1928, and is now docketed as No. 18, Original, October Term, 1929.

3. That this Court's subpoena to answer the aforesaid Bill of Complaint was issued therefrom in May, 1929, and was received by The City of New York.

4. That in response to said subpoena the defendant, The City of New York, applied on June 8, 1929, to this Court for leave to answer said Bill of Complaint, and thereafter on or about June 10, 1929, in response to leave so granted filed in the office of the Clerk of this Court its answer to said bill and the plaintiff was duly served therewith.

5. That it appears through the inability of the Assistant in the office of the defendant's solicitor, the Corporation Counsel of the City of New York, assigned to draw defendant's answer, to ascertain the controverting facts on which defendant's defense was in part to be based, the answer filed by the defendant consisted practically of a general denial only. Such form of answer is authorized and provided for by the public statutes of the State of New York, namely, Section 261 of the Civil Practice Act of said state, and, possibly, by Equity Rule No. 30, of the Rules of this Court.

6. That thereafter and on October 7, 1929, plaintiff moved this Court for leave to file its reply to said answer and for the appointment of a special master to take testimony and prepare and file his findings with recommendations for a decree in this cause, and pursuant to leave duly granted in response to said motion, plaintiff filed its said reply in this Court by joining issue on the answer of the defendant and a special master, namely, the Honorable Edward K. Campbell, was appointed by order of this Court on or about October 14, 1929, to take testimony, to make findings of fact and conclusions of law and to submit the same to this Court with his recommendations for a decree.

7. That thereafter and on or about December 11, 1928, hearings for the taking of testimony in this cause were commenced before said Special Master and were continued on different days from time to time, the last hearing having been held on the 5th day of December, 1930. Very briefly the contention of the plaintiff was that the defendant dumped garbage and refuse into the navigable waters of the United States off the coast of New Jersey; that such garbage and refuse was carried by the winds and tides into the waters of the plaintiff and onto its beaches in great quantities, thereby injuring the plaintiff's property and that of its citizens and costing them large sums of money, each and all in respect of fishing, bathing, navigation and commerce, and seriously menacing the health, safety and welfare of the plaintiff and its citizens. Other contentions were also made. The defendant denied that it dumped its garbage and refuse into the navigable waters of the United States and on the hearings before the Special Master, entirely without objection from defendant's counsel and solicitor (on the ground that it was not pleaded or on any ground) evidence was offered and received to the effect that said defendant had been accustomed for many years to dump and had dumped a certain percentage of its garbage and refuse into the high seas at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12½ and 22 miles from the New Jersey coast under permit from the United States Supervisor of the Harbor of New York issued in accordance with the provisions of Sections 441, 443, 449 and 451 (Title 33, Chapter 9, United States Code Annotated, approved June 30, 1926), and prior statutes upon which based; and that garbage and refuse in large quantities had for many years been dumped into the ocean from steamships and from scows and vessels owned by private contractors and by the United States Navy Yard authorities, or persons employed by them at points from 3 to 25 miles from the New Jersey coast, and that unsanitary sewage had for a number of years last past been discharged into the ocean a short distance from the shore, and from the

inadequate sewers of the New Jersey coast cities of Long Branch and Asbury Park.

8. That when the above mentioned testimony was offered on hearings, plaintiff's counsel and solicitor made no objection thereto, nor to the offer thereof, on the ground of surprise or failure, to plead it, as aforesaid, although defendant's answer did not plead in particular words such matters as defenses.

9. That defendant's counsel and solicitor deems it advisable that its answer should conform to the above mentioned evidence, notwithstanding the lack of objection thereto by plaintiff on the hearings; that said hearings for the taking of testimony have been closed and it is not the desire of the defendant to reopen the same for the taking of further testimony; that although the date set for the submission of proposed findings of fact and conclusions of law, briefs, and argument thereon before the Special Master, is the 4th day of February, 1921, action on this motion need not greatly delay these proceedings, and that at most a few weeks will be all the adjournment necessary.

10. That this motion is not made for the purpose of delay, but in order to safeguard the proved interests of the defendant, and that provision can be made in the order of this Court that the plaintiff's reply (consisting only of the statement that "the plaintiff joins issue on the answer of the defendant") to the original answer may, if desired, be deemed the reply to the amended answer and that all proceedings heretofore taken may be regarded as having been taken as if the amended answer hereto attached and requested to be filed had been originally filed, and defendant's counsel and solicitor so consent.

11. That no substantial right of the plaintiff will be injuriously affected by the granting of this motion. The same

is made on all the pleadings and papers on file in the office of the Clerk of the Supreme Court in this cause and on the papers submitted herewith and upon the record of the testimony taken on the hearings before the Special Master, when and if filed.

The Defendant, therefore, through its said solicitor and counsel, prays that, in furtherance of substantial justice, and in accordance with the provisions of Title 28, Chapter 18, Section 777 of the United States Code, Annotated (approved June 30, 1926) and Rule 19 of the Equity Rules of this Court, it be permitted to file with this Court its amended answer to the bill of complaint herein, copy of which amended answer is hereto annexed, and that the same may take the place of its original answer, which may and shall be considered withdrawn upon the filing of said amended answer.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1929.

STATE OF NEW JERSEY, Plaintiff, against THE CITY OF NEW YORK, Defendant.	No. 18, Original.

AMENDED ANSWER OF THE DEFENDANT, THE CITY OF NEW YORK.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the defendant, The City of New York, by Arthur J. W. Hilly, its Corporate Counsel and its Solicitor herein and, reserving all manner of benefit by objection, exception or otherwise to the many defects, errors, insufficiencies, imperfections and discrepancies in the plaintiff's Bill of Complaint contained, for its amended answer to the said Bill of Complaint the defendant, The City of New York, respectfully shows to the Court and alleges as follows:

FIRST: That it is without knowledge as to all and singular the allegations contained in that item or division of the Bill of Complaint which is designated "I", except as to so much thereof as alleges or purports to allege that the plaintiff is one of the States of the United States of America having its Capitol and seat of Government at the City of Trenton in the State of New Jersey, and except as to the allegations

contained in that paragraph or section thereof which is numbered "2".

AS TO THE ITEM OR DIVISION OF THE BILL OF COMPLAINT WHICH IS DESIGNATED "III", THE DEFENDANT, THE CITY OF NEW YORK, SAYS:

SECOND: That it denies all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 12, 13, 14, 17, 18, 19, 20, 21, 22 and 23.

THIRD: That it is without knowledge as to all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 4, 5, 6, 7, 8, 9, 10, 15 and 16, and therefore denies the same.

FOURTH: That it denies all and singular the allegations contained in the paragraph or section of the Bill of Complaint which is numbered 11 except as to so much thereof as alleges that the defendant, The City of New York has a population of more than 6,000,000 people which is continuously increasing.

FURTHER ANSWERING AND FOR A FIRST DEFENSE, THE DEFENDANT, THE CITY OF NEW YORK, FURTHER ALLEGES:

FIFTH: That the defendant, The City of New York, has for many years last past dumped the garbage and some refuse collected by it in the Atlantic Ocean under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said supervisor under the authority conferred on him by Chapter 496 of the Laws of United States of 1888, June 29, Sec. 1 (25 Statutes 209, as amended, now Title 33, Chapter 9, Sections 441, 443, 449 and 451, United States Code, approved June 30, 1926) at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12½ and 22 miles distant respectively from

the New Jersey shore (being greatly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States; that in view of the dumping of said garbage and refuse on the high seas by said City of New York in the manner and at the points aforesaid, this Court has no authority to enjoin said City, the defendant herein, from said dumping of garbage and refuse so performed.

FURTHER ANSWERING AND FOR A SECOND DEFENSE, THE DEFENDANT, THE CITY OF NEW YORK, FURTHER ALLEGES:

SIXTH: That garbage and refuse in large quantities, including fruit, fruit skins, pieces of meat, vegetables, mattresses, electric light bulbs, pillows, bottles of all sorts, tin cans, boards, barrels, crates and parts thereof, and other pieces of wood, has for many years last past been and is being dumped into the Atlantic Ocean from steamships and other floating equipment, both inside and outside of the entrance to New York Harbor and into the sea lane for vessels clearing for ports south of New York and returning therefrom at distances from 2½ to 8 miles from the shore of New Jersey from Highlands to Barnegat Lighthouse; that cargoes of condemned foodstuffs are and have been for many years past dumped into the sea at a point about 25 miles southeast of Scotland Lightship; that private contractors (i.e. other than those employed in connection with dumping of garbage by The City of New York) have for many years last past dumped under permits issued by the Supervisor of the Harbor of New York under said Title 33, Chapter 9, Sections 441, 442, 449 and 451, United States Code, into the Atlantic Ocean at points from 3 to 8 miles southeast of Scotland Lightship, excavated and refuse material from demolished buildings in the City of New York, which material often contains large quantities of refuse, especially boards, planks, barrels, barrel staves, crates and other pieces of wood, also bottles of all sorts, tin cans, etc.; that such private contractors and the United States

Navy Yard, located in the City of New York, also for many years last past, have been dumping garbage into said ocean, either at points from 8 to 20 miles distant southeast from said Scotland Lightship or nearer thereto under such permits issued by the Supervisor of the Harbor of New York, as aforesaid; that insufficiently treated and foul and unsanitary sewage from the cities of Long Branch and Asbury Park on the coast of New Jersey has been, for a number of years last past, and is being discharged into the Atlantic Ocean a short distance from the beach at each of those cities; that all of said garbage, refuse, sewage and other offensive matter is of the same kind and character as that dumped by The City of New York at points from 8 to 20 miles southeast of Scotland Lightship and from 10 to 22 miles from the New Jersey shore; that such garbage, refuse, sewage and other offensive matter discharged as aforesaid by private contractors, by the United States Navy Yard authorities and by said New Jersey cities into the waters of the Atlantic Ocean in large quantities, would float under the influence of the tide and winds into the waters and onto the beaches of the State of New Jersey and its municipalities claimed to be polluted in this action, and it is impossible to determine whether garbage, refuse and other offensive matter in substantial quantities dumped into the sea as aforesaid by The City of New York is deposited in the waters of the State of New Jersey and on its beaches or in greater quantities than garbage, refuse and offensive matter deposited in the sea by other agencies than The City of New York, as aforesaid, and that if any injury or damage is suffered by the State of New Jersey and/or its citizens or inhabitants or to their health, safety or property, it is not and cannot be chargeable to the acts of the defendant.

FURTHER ANSWERING AND FOR A THIRD DEFENSE, THE DEFENDANT, THE CITY OF NEW YORK, FURTHER ALLEGES:

SEVENTH: That the bill of complaint herein does not state facts sufficient to constitute a cause of action in equity,

nor any matters of equity entitling the plaintiff to the relief prayed for or to any relief nor are the facts stated in the bill of complaint sufficient to entitle the plaintiff to any relief against the defendant.

WHEREFORE, the defendant, The City of New York, prays judgment that the Bill of Complaint herein be dismissed and that it be hence dismissed with its costs and disbursements in this cause sustained and for such other and further relief to this defendant as to the Court may seem meet and proper in the premises.

THE CITY OF NEW YORK,
By ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
Of Counsel.

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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. [redacted], Original.

STATE OF NEW JERSEY,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO AMEND ITS ANSWER.

ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
Of Counsel.

Minister Press, 77-79 Bookman Street, New York City

IN THE

Supreme Court of the United States.

OCTOBER TERM—1929.

STATE OF NEW JERSEY, Plaintiff, against THE CITY OF NEW YORK, Defendant.	No. 18, Original.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO AMEND ITS ANSWER TO CONFORM TO ITS PROOF.

Statement—Nature of Motion.

This is a motion on the part of the defendant, The City of New York, to amend its answer to conform to the proof offered by it and received by the Special Master, who has taken proofs herein preparatory to making findings and a report to this Court. No objection to the proof offered was made by plaintiff's counsel on the ground of surprise or failure to plead special defenses, or to strike out or exclude such proof, nor were exceptions taken on these or any grounds to its admission.

Authority for Making the Motion, Statutory and Under Equity Rule.

Title 28, Chapter 18, Section 777, United States Code Annotated (approved June 30, 1926) provides that:

> Section 777. *"Defects of form; amendments.* No summons, writ, declaration, return, process, judgment,

or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court * * * may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe."

Equity Rule XIX provides as follows:

"The court may at any time in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleadings or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court at every step of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement of Case.

Facts Necessary To Be Considered.

Plaintiff commenced an action herein by leave of Court in May, 1929, to enjoin defendant, its contractors, officers and agents, from dumping any garbage, refuse, or other noxious or offensive matter, into the Atlantic Ocean or other waters of the United States, off the coast of New Jersey, or in otherwise defiling or polluting said waters on the beaches of said state. (Motion, p. 2, par. 1.)

In response to the subpoena of this Court, defendant obtained leave to answer and did in June, 1929 file its answer in form, it will be assumed, of a general denial. (Motion, p. 3, para. 3, 4 and 5.)

Plaintiff replied joining issue in October, 1929, and a Special Master was appointed October 14, 1929, to take testimony, make findings of fact and conclusions of law, and to submit same to this Court with recommendations for a decree. (Motion, p. 3, par. 6.)

In December, hearings before the Special Master commenced and plaintiff offered much testimony. Defendant offered testimony supporting its denials and without objection from *plaintiff's counsel* (by typographical error in motion called defendant's counsel) and offered evidence to the effect (1) that it had been accustomed for many years to dump and had dumped its garbage into the high seas at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12½ and 22 miles from the New Jersey coast, under permit from the United States Supervisor of the Harbor of New York, in accordance with the provisions of Sections 441, 443, 449 and 459 (Title 33, Chapter 9, United States Code Annotated, approved June 30, 1926) and (2) that garbage and refuse had for many years been dumped in large quantities into the ocean from steamships and from scows and vessels owned by private contractors and by the United States Navy Yard authorities at points from 3 to 25 miles from the Jersey coast, and that unsanitary sewage had for a number of years been discharged into the ocean a short distance from said shore from the inadequate sewers of the New Jersey coast cities of Long Branch and Asbury Park. (Motion, p. 4, par. 7.)

No objection of any kind was offered on the part of plaintiff's counsel to this evidence, on the ground of surprise, or that the matters offered to be proved had not been pleaded by way of defense and no motions or exceptions have been made by plaintiff's counsel in relation thereto. (Motion, p. 5, par 8.)

The last hearing before the Special Master was held December 5, 1930. (Motion, p. 4, par. 7.)

Submission of proposed findings of fact and conclusions of law and argument thereon has been set for February 4, 1931, before the Special Master, but this motion is not made for the purpose of delay, but in order to safeguard defendant's proved interests and to conform its answer to the proof. (Motion, p. 5, pars. 9 and 10.)

No further testimony is desired to be taken by defendant, and all proceedings may stand as they now exist, the answer to be permitted to be amended be regarded as if it were the original answer of defendant and filed at the time the original answer was filed. (Motion, p. 5, par. 10.)

That the motion should be granted is asserted in the following:

ARGUMENT.

POINT I.

The amendment of the answer herein so as to set forth the defenses delineated in the moving papers and proposed answer should be allowed in the interest of justice and to protect the substantial rights of the defendant.

The defendant's original answer might be interpreted to amount to little more than a general denial. Equity Rule 30 of this Court, while providing that specific denials are permissible, states that general denials should be avoided. It was evidently the intention of the pleader who drew the City's Answer herein to specifically deny each and every allegation in each of the paragraphs mentioned in the Answer as so denied. It then became a question whether the pleading specifically denied the facts upon which the plaintiff relied in that regard. General denials are provided for under Section 261 of the New York Civil Practice Act which states that the answer must contain:

> "1. A general or specific denial of each material allegation of the complaint controverted by the defendant * * *."

The pleader might, therefore, be excused in thinking that he had pleaded sufficiently in this case to raise an issue.

Assuming, however, that only a general denial was interposed by the City, recent court decisions seem to condemn that form of answer.

Grischy v. *Galvin*, 278 Fed. 301;
Bay Shore Inv. Co. v. *Palmer*, 284 Fed. 979;
Swan v. *Public Utilities Commission of Kansas*, 298 Fed. 114.

What might have been decided, however, in regard to the form of the pleading had the plaintiff raised the question by motion, exception or objection to testimony, is immaterial now, for it in fact replied, joined issue and went through the hearings before the Special Master without doing any of these things. Consequently, it must be taken to have waived any insufficiency of the answer in respect to the character of the denials interposed by defendant.

Slater v. *Maxwell*, 6 Wall. (73 U. S.) 268, 275;
Besson & Co. v. *Goodman*, 147 Fed. 887;
Sprague v. *Providence Savings & Trust Co.*, 163 Fed. 449;
Ted Browning Music Co. v. *Fowler*, 290 Fed. 751;
Volpe v. *Sensatini*, 249 Mass. 132.

In the last mentioned case the answer was a general denial. The Massachusetts Equity Rule is, if anything, stricter in this regard than the rule of this Court. The parties went to trial before the Master, and the Supreme Court of Massachusetts said (p. 134):

> "The plaintiff could not take advantage of defects in the answer after proceeding to trial on the merits before the Master. By failing earlier to object to the sufficiency of the answer, errors in its form and substance must be taken to have been waived."

In regard to the matter of setting up the two additional separate defenses in the proposed new answer not pleaded

originally, failure on the part of the plaintiff to object to the matters proved should also lead to a decision of this motion favorable to the defendant. By these defenses, defendant seeks (1) to set forth in its answer (as it did on the hearings) that the dumping of its garbage took place on the high seas more than one marine league from either the New Jersey shore or even the extreme limit of its territorial waters and that such dumping was carried out under the supervision of and in accordance with the permits issued by the United States Supervisor of the Harbor of New York under an appropriate statute; and (2) that dumping of garbage and refuse in large quantities is done, either near than the New Jersey shore or at the same distances therefrom at which the City dumps through private contractors, by private steamships and by the United States Navy Yard authorities and that the beaches of two of the largest New Jersey shore communities are fouled by their own sewage. Evidence to prove these contentions of defendant was offered by it and not objected to by the plaintiff as not being within the pleadings, etc., and no motions were made by its counsel to strike out or exclude such evidence. Such are the allegations of the motion papers herein and we hardly think they will be denied by the plaintiff's solicitor and counsel. We hardly think, also, that he will claim he asserted surprise when the evidence was offered. The proposed defenses raise no new issues from those litigated at the hearings.

The failure to plead these matters seems to have been due to the difficulty encountered by the original pleader for the City to ascertain the true situation from the New York Department of Street Cleaning which in June, 1929, and for many years prior thereto, had been in charge of the disposal of the greater portion of the New York City garbage and refuse. Assuming that such a situation was open to criticism, the well-known lenient attitude of the Courts as a matter of public policy toward the transaction of official business by public officers requires that the delay in moving to amend should be disregarded.

Seaver v. *the Mayor, etc.*, 7 Hun (New York) 331;
In re Lorillard, 13 N. Y. Supp. 83, 86;
Stemmler v. *the Mayor, etc.*, 45 App. Div. (New York) 573;
Utah Power and Light Co. v. *United States*, 243 U. S. 389.

In the *Seaver* case, *supra*, it is said (p. 332):

> "Public interests, unfortunately, are not as assiduously guarded or as thoroughly protected as those affecting individuals, and the most stringent rules of practice cannot for that reason be applied to the litigation involving them; more leniency is required concerning them, for the purpose of avoiding [illegible] improper enhancement of burthens by the allowance of demands having no just foundation."

In the *Stemmler* case, *supra*, prior authorities are discussed and followed, including *United States* v. *Fitzpatrick*, 9 Wheaton 720, 735.

In the *Utah Power and Light Co.* case, *supra*, this Court, speaking through Mr. Justice Van Devanter, at page 403, said:

> "As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest" (citing long list of authorities).

The same rule, we submit, should be applied here.

The City of New York does not desire to offer any additional evidence in support of such newly pleaded defenses. We hardly see how the plaintiff can claim the right or even exhibit the inclination to do so as no new issue is raised. We, therefore, contend that under the following authorities this Court should, in the exercise of its sound discretion and in the furtherance of substantial justice, permit the amendment without costs, all proceedings to stand as if the answer now sought to be substituted for the original answer had been originally filed.

Title 28, Chapter 18, Section 777, United States Code Annotated, (approved June 30, 1926);
Equity Rule XIX;
Lusk v. *Bush*, 199 Fed. 369, 376;
Davis v. *Gates*, 239 Fed. 192, 196;
Charles E. Hires Co. v. *Port Rico Int. Corporation*, 285 Fed. 645;
Payne v. *Jacksonville Forwarding Co.*, 290 Fed. 936.

In the last mentioned case (in admiralty) the Circuit Court of Appeals said (p. 938):

> "The amendment simply presented a defense claimed to exist under the testimony taken. Such a defense was plainly germane to the controversy. No surprise was claimed by the libellant, nor offer by him of further testimony refused. No request for time to produce further testimony was made and denied. We therefore think the ruling of the Court permitting such amendment was proper."

The moving defendant here is a great municipality with problems much more vast and difficult than that of many states.

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."
>
> *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178.

This suit should, therefore, be regarded in the same light and governed by the same rules as if the action were one between two sovereign states. It has been a rule of long standing that in suits between states great liberality in allowing amendments to pleadings should be extended to the parties. As long ago as 1840 this Court, through Chief Justice Taney, announced this rule:

> "In ordinary cases between individuals, the Court of Chancery has always exercised an equitable discretion in

relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength."

The State of Rhode Island v. *The State of Massachusetts*, 14 Peters 210, 257.

See also

Virginia v. *West Virginia*, 234 U. S. 117,

where this Court permitted the State of West Virginia to file a supplemental answer which involved the opening of the case and the taking of additional testimony although it was expressly stated that it would not have done so had the case been between individuals.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel,
Attorney and Solicitor for the defendant.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
Of Counsel.